IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Western District Of Virginia

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MOTION TO AFFIRM

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INDEX

PAGE

STATEMENT OF THE CASE 2

REASONS FOR AFFIRMANCE 4

1. Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977 Violate the Tenth Amendment by Usurping the Power of the Commonwealth of Virginia to Regulate Land Use 4

2. The District Court Properly Found that Sections 515(d) and 522(e) of the Surface Mining Control and Reclamation Act of 1977 Take Private Property Without Just Compensation in Violation of the Fifth Amendment 7

3, The District Court Correctly Enjoined the Issuance of Summary Cessation Orders Under Section 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 and the Prepayment of Penalties Under Section 518 of the Act on the Ground that they Violate the Due Process Clause of the Fifth Amendment 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

Andrus v. *Allard,* 78-740, November 27, 1979 ..... 7, 8

Appeal of Mutual Supply Company, 366 Pa. 424, 77 At.2d 612 (1951) 5

Berman v. *Parker,* 348 U.S. 26 (1954) 4

City of Euclid v. *Ambler Realty Co.,* 272 U.S. 365 (1926) 4

Construction Industry Assn. v. *City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 4

District of Columbia v. *Train,* 521 F.2d 921 (1975) 6

Table of Authorities Continued

CASES:	PAGE
Duke Power Company v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978)	8
East Fairfield Coal Company v. *Booth*, 166 O. 379, 143 N.E. 2d 309 (1951)	5
Friends of the Earth v. *Carey*, 552 F.2d 25 (2nd Cir. 1977)	6
Fry v. *United States*, 421 U.S. 452 (1975)	5
Fuentes v.*Shevin*, 407 U.S. 67 (1972)	11
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962)	7
Kaiser Aetna v. *United States*, No. 78-738, December 4, 1979	8
Kane v. *Kreiter*, 25 O. 2d 295, 195 N.E. 2d 829 (1963)	5
Mathews v.*Eldridge*, 424 U.S. 319 (1971)	9, 10, 11
Midland Electric Coal Corp. v. *Knox County*, 1 Ill. 2d 200, 115 N.E. 2D 275 (1953)	5
Mitchell v. *W.T. Grant Co.*, 416 U.S. 600 (1974)	10
Montrym v. *Panora*,429 F.Supp. 393 (D.Mass. 1977)	10
National League of Cities v. *Usery*, 426 U.S. 833, 852 (1976)	5
Penn Central Transportation Co. v. *City of New York*, 438 U.S. 104 (1978)	7, 8
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922)	7, 8, 9
R.A. Holhman and Co. v. *SEC*, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1970)	9
Sink v. *Morton*, 529 F.2d 601 (4th Cir. 1975)	10
Stanley v. *Illinois*, 405 U.S. 645 (1972)	11
Star Coal v.*Andrus*, C.A. No. 79-171-2 (S.D. Iowa Feb. 13, 1980)	12
Stypmann v. *City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977)	11

Secretary's regulatory and enforcement powers remain intact under the district court's order. Though cessation orders are now preconditioned on reasonable notice and an opportunity to be heard, the administrative process is under the Secretary's control and he can assure that it is not unduly cumbersome. In any case, as noted by the district court (J.S. App. D at 71a, 72a), a speedy remedy is available to the Secretary through applications to the district court for temporary restraining orders.

REASONS FOR AFFIRMANCE

The district court clearly analyzed and followed the precedents established by this Court in reaching a well-reasoned decision based upon an extensive trial record which fully supports that decision. The appellees believe that the three questions presented by the Secretary must be answered in a manner which affirms the decision of the district court.

1. Sections 515(d) And (e) Of The Surface Mining Control And Reclamation Act Of 1977 Violate The Tenth Amendment By Usurping The Power Of The Commonwealth Of Virginia To Regulate Land Use

Land use regulation has been consistently held by this Court and others to be within the inherent police powers of the states and of the counties, cities and towns which comprise their political subdivisions. *City of Euclid* v. *Ambler Realty, Co.*, 272 U.S. 365 (1926); *Berman* v. *Parker*, 348 U.S. 26 (1954); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Construction Industry Association* v. *City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied.*, 424 U.S. 934; *West Brothers Brick Company* v. *Alexandria*, 169 Va. 271

(1937). Similarly, the power to authorize or restrict mining operations on lands within a state has heretofore been exercised exclusively by the states, counties, municipalities, and their designated agencies. *See, e.g., Midland Electric Coal Corporation* v. *Knox County,* 1 I11.2d 200, 115 N.E.2d 275 (1953); *Appeal of Mutual Supply Company,* 366 Pa. 424, 77 At.2d 612 (1951); *East Fairfield Coal Company* v. *Booth,* 166 O. 379, 143 N.E.2d 309 (1951); *Kane* v. *Kreiter,* 25 O. 2d 295, 195 N.E.2d 829 (1963). *See, also,* 10 ALR 3d. 1226 and cases cited therein. The federal government has not, prior to the Act, claimed any supervening authority in this area.

Though the district court concluded that there exists a federal commerce interest in regulating mining sufficient to support the Act generally,[3] its inquiry could not stop there for even when enacting valid legislation under the Commerce Clause Congress may not under the Tenth Amendment "displace the State's freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976), or "exercise [its] power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry* v. *United States,* 421 U.S. 452 (1975). *National League of Cities* clearly requires the courts to balance the federal commerce interest against the State's interest in controlling its sovereign functions. The district court applied this principle, stating:

> "In considering the relief to be granted in a case like this, the state and federal government's in-

[3] Despite the Secretary's assertion to the contrary, this finding clearly demonstrates that the district court did give due deference to the legislative findings upon which the Act is based. To accept the position of the Secretary would place legislative findings beyond the scrutiny of the courts.

> terests must be balanced. The approximate original contour requirement imposed by the act is not environmentally sound and does not serve the conservation interests of the federal government. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the Act. On the other side, this provision and the postmining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools, hospitals, and for other activities. By recognizing these facts in granting relief, the preemptive power of the federal government through the commerce clause is recognized and the rights of the Commonwealth of Virginia as set out in the Tenth Amendment are preserved." J.S. App.40a,41a.

Such an analytical framework formed the basis for this Court's decision in National League of Cities. It has also been the rationale for decisions by other courts. *District of Columbia* v. *Train,* 521 F.2d 921 (1975); *Friends of the Earth* v. *Carey,* 552 F.2d 25 (2nd Cir. 1977). In balancing these interests the district court found that only those provisions which were excessively intrusive, or not rationally related to the objectives of the federal legislation, would be enjoined, but that other provisions of the Act which were not as intrusive would be allowed to stand. (J.S. App. D at 40a-41a). Such an analysis cannot be faulted by the Secretary.[4]

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[4] The Secretary's contention that the Act "regulates only coal mine operators, not States" is specious. While it is true that the Act regulates mine operators, it does so by usurping the regulatory powers of the States over land use. Sections 503 and 504 of the Act, 30 U.S.C. 1253 and 1254, clearly show that the Secretary is empowered not only to dictate what land use regulations are appropriate for the states, but also to supplant all state regulation with federal regulation if he deems it necessary. There is simply no valid basis for the argument that the integral affairs of state governments are not being regulated.

2. The District Court Properly Found That Sections 515(d) And 522(e) Of The Surface Mining Control And Reclamation Act Of 1977 Take Private Property Without Just Compensation In Violation Of The Fifth Amendment

On the basis of extensive trial evidence the district court found that returning a steep slope to original contour after surface mining is "economically infeasible and physically impossible," J.S. App. 37a, and enumerated the reasons why this is true. J.S. App. 38a. The court found as a fact that ninety-five percent of strippable coal reserves in Virginia are located on steep slopes, and that the Act effectively denies the owners of such lands of the right to remove the coal. Further, the court found, because the Act does not permit leaving the land in a level condition it denies the owner of the post-mining economic value of the land for higher potential use as level land suitable for agriculture, grazing of cattle or sheep, or construction of homes, schools, industrial sites, and shopping centers. As a result, the court found, "[I]ts value has been diminished to practically nothing," with a nominal value of from five dollars to seventy-five dollars an acre, "whereas, if it were left leveled or stabilized with benches, with roads already constructed it would be worth from five thousand dollars to three hundred thousand dollars per acre." J.S. App. 45a.

The court then proceeded to analyze the leading decisions of this Court relating to the "taking" clause, and discussed the rationale of each of these decisions, beginning with *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), through *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978); *Andrus*

v. *Allard,* No. 78-740, November 27, 1979; and *Kaiser Aetna* v. *United States,* No. 78-738, December 4, 1979. The court concluded that neither *Penn Central, Kaiser Aetna,* nor *Allard* overruled *Pennsylvania Coal Co.* v. *Mahon,* and that the latter case remains good law today.

Given these findings of the district court, this case falls squarely within the holding of this Court in *Pennsylvania Coal Company* v. *Mahon, supra.* As stated by Mr. Justice Holmes:

> " 'for practical purposes, the right to coal consists in the right to mine it.' What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414-15.

No statement of this Court is more closely on point. The statutes contested here by the Appellees[5] have the same confiscatory effects as the statute challenged in *Pennsylvania Coal Company.* Clearly, such a taking cannot be approved without requiring payment of just compensation.

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[5] It is frivolous for the Secretary to contend that the issue was not ripe for decision. The Virginia Surface Mining and Reclamation Association, Inc., demonstrated to the district court that its members had property interests in surface mineable coal subject to the requirements of Section 515 and 522 of the Act, 30 U.S.C. 1265 and 1272, and that such sections effectively prevent them from surface mining their coal. *Duke Power Company* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978).

3. The District Court Correctly Enjoined The Issuance Of Summary Cessation Orders Under Section 521(a)(2) Of The Surface Mining And Reclamation Act of 1977 And The Prepayment Of Penalties Under Section 518 Of The Act On The Ground That They Violate The Due Process Clause Of The Fifth Amendment.

The standard for determining whether the due process clause of the Fifth Amendment requires a hearing before imposition of sanctions was described by this Court in *Mathews* v. *Eldridge,* 424 U.S. 319 (1971). There the Court states:

> "that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

In the context of the instant case, there can be no question that the private interests involved are substantial in a constitutional sense. Not only does the issuance of cessation orders cause significant monetary losses to mine operators, but such orders can and have had the effect of driving mining companies out of business. (J.S. App. 65a-66a and 69a-70a respectively). *See, Pennsylvania Coal Co.* v. *Mahon, supra; R.A. Holhman and Co.* v. *SEC* 299 F.2d 127 (D.C. Cir.), *cert. denied,* 370 U.S. 911 (1970).

The second factor to be considered under *Mathews,* risk of erroneous deprivations, is also clearly present. The evidence before the district court identified a number of specific instances in which cessation orders were issued in an arbitrary and capricious manner. (J.S.-App. 65a-66a and 69a-70a). Moreover, at trial the Secretary was unable to identify even one instance in which the issuance of a cessation order was found to be necessary to protect health and safety or the environment. The lack of objective criteria upon which the Secretary's inspectors are to act requires them to make and implement purely subjective decisions.[6] Where there are no quantifiable guidelines upon which to base a summary deprivation of property, *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), where there is no provision for prior input by the operator, *Montrym* v. *Panora,* 429 F.Supp. 393 (D.Mass. 1977), and where the governmental action will effectively paralyze the operation of a business and drive its operator to the wall, *United States* v. *Vertol,* 545 F.2d 648, 651 (9th Cir. 1976), such a property deprivation has not been accomplished with due process of law. Moreover, where the loss cannot be compensated, the private interest is of such a magnitude that a pre-hearing taking can rarely be

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[6] The Secretary relies on *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975) to support the constitutionality of summary enforcement provisions. However, the enforcement provisions of the Federal Coal Mine Health and Safety Act of 1960, 30 U.S.C. 814(c) authorize summary withdrawal orders only where the inspector has found a violation of a mandatory health or safety standard of a nature that could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, where such violation is caused by an unwarrantable failure of the mine operator and where another such violation also exists, or is found to exist in an inspection conducted within 90 days after the operator is given notice of the first violation. Thus, such inspectors are guided by substantive, mandatory health or safety standards.

justified. *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Stypmann* v. *City and County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977). The existence of each of these factors in the present case amply demonstrates that the second prong of the *Mathews* test has been met.

Finally, *Mathews* requires that the governmental interest in question be considered in light of the fiscal or administrative burdens that other procedural requirements would entail. This does not negate other considerations, but does require the court to balance the competing interests. Generally, a taking without a prior hearing to advance a valid government purpose can be justified only in extraordinary circumstances. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Where reasonable alternative means exist, they should be used. *Vlandis* v. *Klein,* 412 U.S. 441 (1973).

The Act will not involve a high volume of cases confronting the regulatory authority. Thus, unlike the situation in *Mathews,* the regulatory authority would not be confronted with a massive and excessively expensive burden if it were required to afford mine operators a hearing prior to issuance of a cessation order. Moreover, in similar circumstances, other federal agencies have been able to function adequately with presanction hearing requirements. *See* Federal Water Pollution Control Act of 1972, 33 U.S.C. 1364; Occupational Safety and Health Act, 29 U.S.C. 662. Similar procedures, as required by the district court, will adequately protect the governmental interest asserted under the Act, and the Secretary did not demonstrate otherwise at trial.

Section 518(c) of the Act, 30 U.S.C. 1268(c), also denies mine operators due process of law because it requires an operator who desires to contest a charge against him to post the proposed penalty in order to ob-

tain any administrative or judicial review of the alleged violation or the penalty being proposed thereon. The district court was not confused, as suggested by the Secretary (J.S. at 32), with respect to the nature of the prepayment requirement. On the contrary, the district court recognized that the "refund-with-interest" provision does not adequately protect operators because it ties up needed capital, and in any case, prepayment of penalties can have the effect of a cessation order where the mine operator is faced with the threat of continued daily monetary losses if he does not discontinue the alleged violation. (J.S. App. 69a-70a).[7] Quite simply, the District Court understood only too well that this tool can be used to pressure operators to correct questionable violations and to make unwarranted penalty payments in order to continue their operations without tieing up badly needed capital. *See, Star Coal Co.* v. *Andrus,* C.A. No. 79-171-2 (S.D. Iowa Feb. 13, 1980).

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[7] The Secretary has simply ignored these findings of the district court when he asserts that prepayment does not impose "significant burdens on mine operators" because interest on the prepaid penalty protects mine operators against financial injury. (J.S. at 33).

CONCLUSION

For the reasons stated herein, the decision of the district court should be affirmed as to all questions presented.

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